83-5942

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF THE
STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER STATE POLICE AND FIRE INVESTIGATORS VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ENTERING AND SEARCHING PETITIONER'S RESIDENCE WITHOUT A WARRANT FOUR HOURS AFTER A FIRE IN ONE ROOM OF THE RESIDENCE HAD BEEN EXTINGUISHED.

2. WHETHER THIS COURT'S DECISION IN MICHIGAN V. TYLER, 436 U.S. 499 (1978), SHOULD BE APPLIED IN JUDGING THE CONSTITUTIONALITY OF A CONVICTION THAT BECAME FINAL BEFORE MICHIGAN V. TYLER WAS DECIDED.

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of Criminal Procedure. On July 20, 1983, the Superior Court denied petitioner's motion for rehearing. Thereafter, petitioner timely filed a petition for review in the Arizona Supreme Court. That court denied discretionary review on October 18, 1983. Petitioner filed this petition for a writ of certiorari on December 16, 1983.

This Court has jurisdiction to review the decision of the Maricopa County Superior Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Procedural History

In the early morning hours of November 16, 1973, petitioner John Henry Knapp's two daughters perished in a fire that occurred in the Knapp residence. Petitioner was charged with the first-degree murder of his daughters and was eventually convicted in November of 1974, following one trial which ended in a hung jury. Throughout both trials, and in every subsequent proceeding, petitioner has maintained his innocence of any wrongdoing in the death of his daughters.

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On January 6, 1975, petitioner was sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence on March 9, 1977, and this Court denied certiorari. State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978). Petitioner's case was subsequently remanded to the trial court for resentencing in the aftermath of State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), which struck down Arizona statutory limitations on the presentation of mitigating evidence in capital sentencing. On remand, a motion for postconviction relief was heard and determined concurrently with resentencing, pursuant to Arizona Rule of Criminal Procedure 32. Knapp's postconviction relief petition was confined to newly discovered evidence probative of his innocence. All relief was denied, and Knapp was again sentenced to death. The Arizona Supreme Court again affirmed the trial court's disposition. State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), supplemented, 127 Ariz. 65, 618 P.2d 235 (1980).

On February 25, 1983, Knapp initiated a second petition for postconviction relief in Maricopa County Superior Court. The Arizona Supreme Court stayed petitioner's execution pending final disposition of the postconviction proceeding. Among the issues raised in the petition was a challenge to the use at trial of evidence seized by police and fire investigators in a series of warrantless searches of petitioner's residence. Petitioner requested an evidentiary hearing to determine facts critical to the search and seizure question. On June 16, 1983, the Superior Court denied the petition with a brief opinion. The court neither conducted an evidentiary hearing nor heard oral argument. It disposed of petitioner's Fourth Amendment claims with the statement that "this issue does not form the

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basis for relief for defendant." No further explanation appeared in the court's opinion.

Petitioner sought rehearing in the Superior Court, arguing among other matters that the court erred in rejecting his challenge to the warrantless searches of his residence. The Superior Court denied rehearing without opinion.

Following denial of rehearing in the trial court, Knapp filed a petition for review in the Arizona Supreme Court, which under Arizona law has exclusive jurisdiction over all appeals in capital cases. The petition sought to invoke the discretionary jurisdiction of that Court. Petitioner again challenged the State's use of evidence seized in warrantless searches of his residence on the day of the fire and during succeeding weeks. On October 19, 1983, the Arizona Supreme Court denied discretionary review of the Superior Court's judgment without opinion, with Justice Stanley G. Feldman voting to grant the petition and hear full argument.

B. Facts Material to the Questions Presented

The fire at the Knapp residence broke out in the children's bedroom sometime after 8:00 on the morning of November 16, 1973. 10/23/74 R.T. at 40. 56, 64. Firemen began arriving at the residence at approximately 8:30 and had extinguisned the blaze in the space of three to four minutes. 10/23/74 R.T. at 80, 10/24/74 R.T. at 58. The firemen then began conducting clean-up operations. A police fire inspector, James McDaniel, and a photographer arrived at the residence at approximately 10:30 a.m. and began to conduct a preliminary investigation. 10/23/74 R.T. at 30, 10/28/74 R.T. at 4. A deputy fire marshall, David Dale, joined the first investigator at approximately 12:55, nearly four and one-half hours after the fire had been extinguished. 10/29/74 R.T. at 62-63, 65. The investigators then began to search the bedroom in which the

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fire occurred, examining debris from the fire by hand. At approximately 2:30 p.m., a Maricopa County sheriff's deputy, Leon Stratton, also arrived and joined in the search. 10/31/74 R.T. at 43. Although the record is not entirely clear, it appears that physical evidence which the State later introduced into evidence in support of its arson theory was seized during the course of this investigation. This evidence consisted of carpet samples and other debris, which state experts later examined for proof of arson. None of the investigators had obtained a warrant or petitioner's consent prior to their search.

A detective from the Maricopa County Sheriff's Office conducted a second search three days after the fire, and possibly thereafter, and seized a Coleman fuel can and Coleman lantern, also introduced in evidence against petitioner at trial. 10/31/74 R.T. at 44-47. The sheriff's deputy also acted without obtaining a warrant or petitioner's consent.

Sometime during the day of the fire, the investigators contacted a local justice of the peace, Leo S. Coombs. Acting as coroner, Judge Coombs directed the deputies to "seal" the house and conduct an investigation. At various times thereafter he gave his "permission" for state investigators to reenter the premises. However, Judge Coombs testified at pretrial hearings that at no time during the day of the fire or thereafter did he issue a search warrant based on probable cause. 8/6/74 R.T. at 98-99.

Prior to trial, the defense moved to suppress all evidence seized after the day of the fire on Fourth Amendment grounds. At the suppression hearing, the trial court questioned whether an evidentiary hearing was necessary. Defense counsel responded that the defense did not have a complete list of all of the evidence seized from the house, nor did the existing

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record indicate when each item was removed. 8/7/74 R.T. at 95. The court, however, decided to postpone any inquiry into these details until it had determined whether the searches were constitutionally valid -- apparently on the theory that such a determination would not hinge on facts concerning the precise chronology of the searches or facts concerning the circumstances of each seizure. 8/7/74 R.T. at 96.

At the hearing, the State maintained that fire investigators and police officers had properly seized the entire house as State's evidence. Since the entire house and its contents were "State's evidence," 8/7/74 R.T. at 139, petitioner had forfeited whatever expectations of privacy he had once enjoyed. 8/7/74 R.T. at 141. The State introduced no evidence that the Knapps had "abandoned" the residence at the time of the challenged searches, or had otherwise consented to them.

Because of the nature of the State's arguments, the court heard no evidence as to (a) whether the search conducted hours after the fire had occurred was justified by exigent circumstances associated with the fire itself, or (b) whether evidence observed by firemen during the course of extinguishing the blaze was in "plain view."

After taking the matter under advisement, the trial court denied petitioner's motion to suppress. The trial judge explained from the bench his conclusion that police had properly taken possession of the premises as evidence, and that since the Knapps had not lived in the premises after the fire, no search warrant was necessary. 8/8/74 R.T. at 3.

Petitioner was subsequently convicted and his conviction was affirmed on appeal. Petitioner did not raise his Fourth Amendment claims on direct appeal. He raised them for the first time in his state postconviction petition, filed under

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Rule 32 of the Arizona Rules of Criminal Procedure. Petitioner relied in part on this Court's decision in Michigan v. Tyler, 436 U.S. 499 (1978).

In response, the State argued, among other matters, that Michigan v. Tyler should not be applied retroactively.

As noted earlier, the Superior Court considered the Fourth Amendment issue on the merits and denied relief, but without explanation.

ARGUMENT

I. STATE FIRE INVESTIGATORS VIOLATED PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THEY CONDUCTED WARRANTLESS SEARCHES OF HIS RESIDENCE WITHOUT PROOF THAT EXIGENT CIRCUMSTANCES EXCUSED COMPLIANCE WITH THE WARRANT REQUIREMENT.

The Fourth Amendment to the federal constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961), prohibits unreasonable searches and seizures. This Court has repeatedly held that warrantless searches, conducted without the defendant's consent, are presumptively unreasonable:

> "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well delineated exceptions.

Katz v. United States, 389 U.S. 347, 357 (1967).

The "mandate of the Fourth Amendment" referred to by the Court applies with particular force to searches of homes, for the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972). The Court has recently reaffirmed this uncompromising mandate: "It is a 'basic principle of Fourth Amendment law'

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that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980). As a consequence, a State bears the burden of establishing that a warrantless search is otherwise reasonable under the Fourth Amendment. E.g., United States v. Jeffers, 342 U.S. 48, 51 (1951); Wilson v. Health & Hospital Corp., 620 F.2d 1201, 1208 (7th Cir. 1980) (search incident to investigation of fire).

In the suppression hearing preceding petitioner's trial, the State argued that because fire department officials had properly entered the dwelling to extinguish the blaze and had later seized the entire home as "State's evidence," petitioner lost any expectation of privacy he once enjoyed. The trial judge apparently agreed with this reasoning, and emphasized the additional fact that petitioner and his wife no longer occupied the house after the fire.

In a decision handed down after petitioner's conviction became final, this Court squarely rejected the reasoning advanced by the State and relied on by the trial court, and held that failure to comply with the warrant requirement is not excused simply because a fire has occurred in the residence subsequently searched. Michigan v. Tyler, 436 U.S. 499 (1978). In Tyler, respondents had been convicted in state court of conspiring to burn their furniture store. Police and fire officials had gathered incriminating evidence during three warrantless searches of the burned premises.

The first search occurred during and immediately after efforts to extinguish the fire. The second occurred four hours after the fire had been extinguished and after the inspectors had left and then returned to the premises. The third occurred almost four weeks after the fire. The State argued that if respondents had set the fire, they had effectively abandoned

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the premises and that, if innocent, they would not be aggrieved by an intrusion into what little remained of their expectations of privacy in the structure.

This Court forcefully rejected the State's theory:

> [T]here is no diminution of a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. And under that Amendment, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

436 U.S. at 506 (quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967)).

Applying traditional Fourth Amendment principles to the case before it, this Court held that the first search, conducted during and immediately after the fire, was "reasonable," notwithstanding the absence of a warrant, because the fire presented exigent circumstances necessary to justify a warrantless entry; once in the building, the firemen could seize evidence in "plain view." 436 U.S. at 509.

In addition, the Court established a rule permitting fire officials to "remain in the building for a reasonable time to investigate the cause of the blaze after it has been extinguished." Id. at 510. The purpose of this exception was twofold: to allow prompt action "to prevent [the fire'] recurrence" and "to preserve evidence from intentional or accidental destruction." Id. at 510.

In light of this rule, the Court held that the search conducted four weeks after the fire was clearly removed from

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the initial exigency and thus was clearly invalid absent a warrant or consent. Id. at 511.

As to the second search, conducted in the early morning four hours after the fire was extinguished, the Court emphasized that state officials had departed solely because visibility was hindered by darkness, steam and smoke. The Court concluded, therefore, that the second search was "no more than an actual continuance of the first." Id. at 511. The second search, therefore, was also justified by the exigency that excused the first. Ibid.

In sum, Tyler held that although the occurrence of a fire provides exigent circumstances justifying a warrantless entry into a burning building, and although firemen may seize evidence in plain view during the course of extinguishing the fire, the exigency ceases once the blaze has been extinguished and fire officials have taken steps both to assure that it will not rekindle and to prevent the imminent destruction of evidence. Thereafter, the normal requirements of the warrant clause must be observed before further investigation can occur. Id. at 509-11.

In this case the first fire investigator did not arrive on the scene until two hours after the blaze had been extinguished. Deputy Fire Marshall Dale did not arrive until nearly four and one-half hours after the fire had been put out, and six hours had elapsed before Sheriff's Deputy Stratton entered the residence. None of these men obtained warrants and there is absolutely no evidence in the record that exigent circumstances continued to exist during the times of these entries and searches. Clearly, no exigent circumstances existed three days after the fire, when Deputy Stratton returned to seize the Coleman fuel can and Coleman lantern.

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At a minimum, petitioner is entitled to an evidentiary hearing to determine the following issues: (1) What evidence was actually seized the day of the fire, by whom, and at what time; (2) did exigent circumstances continue to exist at the time of those searches and seizures; (3) was the evidence seized in plain view. Neither the trial court, nor the Superior Court in petitioner's postconviction proceeding, saw any need to conduct such an evidentiary hearing, notwithstanding the fact that the State, and not petitioner, bore the burden of putting evidence in the record to justify its warrantless intrusions.

In the postconviction proceedings below, the State argued that the trial court found that petitioner had abandoned his residence at the time of the searches. First, under Arizona property law, abandonment requires proof that the premises were vacated "with intent to relinquish all rights therein." Gangadean v. Erickson, 17 Ariz. App. 131, 495 P.2d 1338, 1340 (1972). The trial judge in this case merely found that neither John nor Linda Knapp returned to the premises after the fire. He did not find that they had "abandoned" the premises for purposes of the Fourth Amendment, and indeed, the Assistant County Attorney prosecuting the case expressly disavowed any intention to argue abandonment. 8/7/74 R.T. at 138. Further, as the Tyler court recognized, privacy interests remain even if the residents no longer occupy the premises. 436 U.S. at 505-06.

Second, there was certainly no evidence of abandonment on the day of the fire, when the most thorough searches occurred. Indeed, petitioner and his wife had been absent from the premises only three or four hours before the warrantless searches began. Their mere absence for that period of time could not possibly give rise to a reasonable inference of

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abandonment. Moreover, the State's abandonment argument rings particularly hollow in light of the fact that the State purported to seize and seal the entire house as "State's evidence," thus involuntarily evicting its occupants.

No state court in Arizona has yet permitted petitioner the opportunity of an evidentiary hearing to test the lawfulness of the searches of his home. No state court has yet provided a convincing reason to justify the State's warrantless entries, searches, and seizures the day of the fire. Indeed, the decision of the Superior Court below directly conflicts with this Court's decision in Michigan v. Tyler, supra, and with earlier decisions recognizing the presumptive invalidity of warrantless residence searches. Nevertheless, the State is fully prepared to take petitioner's life without a full airing of this issue.

In light of this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), it is unlikely that petitioner will be permitted to argue his Fourth Amendment claims to a federal district court on a petition for a writ of habeas corpus. Because the legal question is substantial, because the decision below conflicts with a decision of this Court, and because petitioner's life hangs in the balance, this Court should grant certiorari to review the Superior Court's decision upholding the warrantless searches of his home.

At a minimum, this Court should hold this petition until it has handed down its decision in Michigan v. Clifford, No. 82-357, cert. granted, 51 U.S.L.W. 3545 (Jan. 24, 1983), and then grant, vacate and remand the lower court judgment for further consideration in light of Clifford.

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II. BECAUSE MICHIGAN V. TYLER DID NOT CREATE A CHANGE IN THE LAW, NO FEDERAL QUESTION OF RETROACTIVITY ARISES, AND CONSEQUENTLY TYLER SHOULD BE APPLIED IN JUDGING THE VALIDITY OF THE WARRANTLESS SEARCHES IN THIS CASE.

In the postconviction proceedings below, the State argued that petitioner's Fourth Amendment claims relied almost entirely on this Court's decision in Michigan v. Tyler, supra, and that because Tyler was decided after petitioner's conviction became final, Tyler should not be applied retroactively. Petitioner responded to this argument in its reply memorandum below, and again in its motion for rehearing. Because the Superior Court did not explain its denial of petitioner's Fourth Amendment claims, the court could have based its judgment on the State's retroactivity argument, and denied relief on the ground that Michigan v. Tyler should not be applied retroactively.

Such a judgment conflicts with this Court's decision in United States v. Johnson, 102 S. Ct. 2579 (1982), and its predecessors governing federal questions concerning retroactivity. Alternatively, this Court should grant certiorari to clarify the standards governing the circumstances under which retroactivity questions may properly arise in the application of federal precedents.

As this Court has previously held, no question of retroactivity arises unless the new decision declares a rule that represents "a clear break with the past." Desist v. United States, 394 U.S. 244, 248 (1969), causing "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one," Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 498 (1968). This Court declared just two Terms ago that

> when a decision of this court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply

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> retrospectively. In such cases, it has been a foregone conclusion that the rule of the later cases applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

United States v. Johnson, 102 S. Ct. 2579, 2587 (1982).

If a new constitutional decision does not overrule one of this Court's past precedents and does not disapprove a practice arguably sanctioned by the Court on prior occasions, a retroactivity question arises only if the new decision "overturns a longstanding and widespread practice . . . which a near-unanimous body of lower court authority has expressly approved." Id. at 2588.

Tyler does not fall into this category. Prior to Tyler this Court had never intimated, much less held, that fire investigators were permitted to remain on the premises for an indefinite length of time, without a warrant, in order to gather evidence of a crime. Indeed, the Court held as early as 1967 that the Fourth Amendment prohibited fire inspectors from making warrantless entries into private dwellings or commercial structures even in order "to locate and abate a suspected public nuisance, or simply to perform routine periodic inspection." Tyler, supra, 436 U.S. at 504-05 (summarizing Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967)). The Court had also repeatedly held that investigators could not enter a house to search for evidence of a crime without obtaining a warrant or demonstrating emergency circumstances sufficient to excuse compliance with the warrant requirement. See Tyler, supra, 436 U.S. at 509-10; United States v. Johnson, supra, 2589 n.13 (citing venerable Supreme Court decisions barring warrantless entries into homes).

Tyler did not represent a sharp break with prior law. It "merely has applied settled precedents to [a] new and different

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factual situation[]." United States v. Johnson, 102 S. Ct. at 2587. In this case, Tyler merely confirmed what existing Fourth Amendment decisions indicated at the time of the search, that the trial court erred in permitting introduction against petitioner of evidence seized in warrantless searches of his residence. No question of retroactive application need be considered.

In the lower court the State argued that Michigan v. Tyler did work a sharp break in the law because it overruled Arizona law, which at the time of the searches approved warrantless, contemporaneous searches of the scene of a homicide. See State v. Sample, 107 Ariz. 407, 487 P.2d 44 (1971); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974). See also Mincey v. Arizona, 437 U.S. 385 (1978) ("murder scene" exception).

First, Michigan v. Tyler simply did not concern the "murder scene" exception. Indeed, the fire in Tyler merely caused property damage in a commercial structure. Consequently, it did not represent a break with even Arizona authority concerning searches of a murder scene. Moreover, the trial judge in this case did not rely on the "murder scene" exception in overruling petitioner's motion to suppress. He relied instead on his perception that the Knapps no longer occupied the premises, and the State's declaration that it had seized the entire house as evidence. See 8/8/74 R.T. at 3. In fact, the trial judge concluded that if the Knapps had remained in the residence after the fire, search warrants would have been necessary. Id.

Second, as this Court recognized in United States v. Johnson, supra, 102 S. Ct. at 2588, if a new constitutional decision does not overrule one of this Court's past precedents and does not disapprove a practice arguably sanctioned by the Court on prior occasions, a retroactivity question arises only

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if the new decision "overturns a longstanding and widespread practice . . . which a near-unanimous body of lower court authority has expressly approved." The cases cited by the State below do not constitute a "near-unanimous body of lower court authority" approving warrantless searches once the exigency of a fire has passed.

Third, the "murder scene" exception established in Sample did not represent a "near-unanimous" wall of authority even within the confines of Arizona. In 1972, the United States Court of Appeals for the Ninth Circuit disapproved of the "murder scene" exception in a habeas case filed by the very defendant whose conviction had been upheld in State v. Sample, thereby establishing the federal rule to be followed in Arizona. See Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972). Of critical importance, this split of state and federal authority had fully matured well before the fire that occurred in the Knapp residence in November 1973. See State v. Duke, supra, 518 P.2d at 574.

Fourth, even if the "murder scene" exception had been the basis for the trial court's denial of the suppression motion, and even if it had enjoyed the "near-unanimous" support of lower court authority, Tyler still would not have represented a break in the law. State v. Duke, supra, on which the State relies, limited application of the murder scene exception to "a contemporaneous warrantless search of the scene of a crime at the time of the discovery of the body." 518 P.2d at 574. In distinguishing the Ninth Circuit decision in Sample, the Duke court necessarily implied that a warrantless search following discovery of the murder victim by only two hours would be outside the exception, and consequently unconstitutional. As noted in petitioner's application, the critical searches in

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this case occurred over four hours after the fire had been extinguished and the bodies removed.

Finally, the Court should be aware of the significant character of the State's argument: It is that a federal retroactivity question arises whenever a decision of this Court implicitly disapproves of decisions in the forum state which arguably sanctioned the unconstitutional conduct. As explained above, that argument is for several reasons unconvincing in the context of this case. Nevertheless, the state court may well have accepted the argument in rejecting petitioner's application for postconviction relief. As petitioner has explained, this issue is independently worthy of a grant of certiorari: whether a state may deny effect to a new decision of this Court merely because it implicitly disapproved of certain judicial decisions within that state, despite the fact that it did not work a break in the law established by this Court and other lower courts.

CONCLUSION

The decision of the Maricopa County Superior Court rejecting petitioner's constitutional claims is erroneous and is in conflict with decisions of this Court. Indeed, the judgment of the Superior Court, rendered without benefit of an evidentiary hearing or even oral argument, is so perfunctory as to suggest that petitioner has not yet received a full and fair hearing on his federal claims in any forum. The questions raised are substantial, as are the consequences of an erroneous judgment. To prevent the forfeiture of petitioner's life, along with his federal constitutional rignts, petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the Maricopa County Superior Court in this case.

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Mariscal, Weeks, McIntyre & Friedlander

DATED this 16th day of December, 1983.

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AFFIDAVIT OF SERVICE

JAMES E. SCARBORO, being first duly sworn, upon his oath deposes and says:

That he is a member of the Bar of this Court and that in accordance with Rule 28.2, Supreme Court Rules, the following documents were deposited in a United States post office for mailing, with first-class postage prepaid, to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and to Crane McClennen, Asst. Arizona Attorney General, 1275 West Washington, Second Floor, Phoenix, Arizona 85007, on this 16th day of December 1983:

(a) Motion for Leave to Proceed in Forma Pauperis;

(b) Petition for Writ of Certiorari to the Maricopa County Superior Court of the State of Arizona;

(c) Affidavit of Service.

James E. Scarboro

SUBSCRIBED AND SWORN to before me this 16th day of December, 1983, by James E. Scarboro.

Notary Public

My Commission Expires:

May 5, 1987

MARSON, MEYER HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION
2700 NORTH THIRD STREET
SUITE 4000
PHOENIX, ARIZONA 85004

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS

BONDS - REFUND

FORFEITURE

CHANGE OF VENUE

JURY FEES

REWARDS

SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE
Div. DATE JUDGE OF COMMISSIONER Clerk
K. Dollins
Deputy

CR 78779

STATE OF ARIZONA

vs.

JOHN HENRY KNAPP

Attorney General
by: Crane McClennan

James E. Scarboro/Larry A. Hamm
Mark S. Wallace/Parker C. F.

Having been submitted for initial review pursuant to Rule 32, the Court has carefully read the petition, the response and the reply. The Court has also reviewed the court files in the matter.

Defendant alleges the trial court erred in refusing to allot funds to defendant's expert to ~~XXX~~construct a full scale replica of the room in which the fire took place. PUrsuant to Rule 32, defendant is precluded from now raising this issue as it was raised in his fifth appeal and decided adversely to defendant's position.

Defendant alleges the trial court erred in excluding evidence of the experiments conducted by defendant's expert. This matter was carefully addressed on the record by the trial court and the ruling could have been tested on appeal. It is now waived by failur to raise on appeal or precluded by having been already decided.

Defendant contends that it is the combination of the foregoing two alleged errors that is itself the error. These matters were known to defendant at the time of the appeal and the first PCR. The matters are carefully documented in the record. Defendant has waived this argument by failing to timely raise it heretofore.

Defendant alleges this confession was not voluntary. This issu was raised in defendant's first appeal and the Court decided against him. He is now precluded from raising this issue.

Defendant alleges the evidence was illegally seized from the trailer after the date of the fire and that he has not waived this issue because there has been a change in the law since his trial. A careful review of the record shows only two items seized after the day of the fire - a full can of Coleman fuel from the living room and the Coleman lantern found in the bathroom. Pictures of these items were taken in place on the day of the fire and the

(continued)

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

DISTRIBUTION

APPEALS

BONDS REFUND

FORFEIT

CHANGE OF VENUE

JURY FEES

REMANDS

SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, Clerk
K. Dollins, Deputy

CR 78779 STATE v. KNAPP (continued)

pictures were admitted without objection. Many witnesses described the items having seen them during and immediately after the fire. The testimony was without objection. Even if seized illegally, a fact which need not be decided here, the admission of the items themselves was harmless in view of the pictures and the testimony.

Defendant alleges the items seized the day of the fire were illegally seized. This issue was raised initially in writing in the trial court but abandoned during argument and never again raised until this PCR. There is no issue of fact in dispute as to the ~~XX~~items and times of seizure and circumstances of seizure and a study of the authorities cited in the arguments made herein does not favor defendant's position and thus this issue does not form the basis for relief for defendant.

Defendant alleges the Arizona Supreme Court did not conduct an appropriate review of his sentence as it failed to make a peoportio: review. This Court has no jurisdiction to rule that the Arizona Supreme Court erred. A review of both opinions indicates the Court knew what its job was and set about doing it.

As to his contentions regarding errors in sentencing, defendant alleges:

1. The Arizona Supreme Court failed to conduct a proportionali review - both where the death penalty was imposed, as well as where there was a life sentence. The record has been quoted extensively by both parties from the record on each of the appeals herein. The Supreme Court obviously knew its job, did it as it saw it and this trial court is in no legal position to take issue with its findings.

2. The Arizona Capital sentencing statute is constitutionally infirm because: (a) it does not provide adequate guidance to the trial court in imposing sentence. Gretzler rule to the contrary. (b) for failure to require the State to prove beyond a reasonable doubt that ~~XX~~aggravating factors exist and outweigh the mitigating factors. The law does not support this allegation. (c) it requires t death penalty if the State proves one or more aggravating factors an defendant is unable to show sufficient mitigating factors. The law

(continued)

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS

BOND ON APPEAL

FORFEITURE

CHANGE OF VENUE

JURY FEES

REMANDS

SENTENCING

10 | June 16, 1983 | HON. MARILYN A. RIDDEL | VIVIAN KRINGLE, R. Dollins

CR 78779 | STATE v. KNAPP | *(continued)

clear and supports the constitutionality of this statute.

3. The sentencing court's failure to consider doubt as to defendant's guilt as a mitigating factor. The record in this regard is lengthy and clear. The sentencing judge did not feel that he could consider this matter as a mitigating factor, but stated that even if he could, he did not consider the matter mitigating. The matter was squarely before the ~~XXXXXXX~~ appellate court on appeal and is not now properly raised in a Rule 32 proceeding.

4. The sentencing court erred in finding defendant acted in a heinous, cruel or depraved manner under the Arizona definition. This claim has been rejected in Gretzler and the appellate decision herein.

5. The capital sentencing statute is unconstitutional for failure to establish the burden of proof. Inasmuch as the state proved the aggravating factor "burning a child to death" beyond a reasonable doubt and the sentencing court found this to be "heinous cruel or depraved" and the appellate court agreed, this issue does not apply in this case.

6, 7 and 8. The defendant had a right to sentencing by a jury. This claim has been rejected in Gretzler.

Based upon the foregoing analysis, there is no questions of law or fact raised upon which defendant might obtain relief and ,

IT IS ORDERED denying defendant's petition for post conviction relief.

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

October 19, 1983

STATE OF ARIZONA,

Appellee,

vs.

JOHN HENRY KNAPP,

Appellant.

Supreme Court
No. 3106-2-PC

Maricopa County
No. CR-78779

The following action was taken by the Supreme Court of the State of Arizona on October 18, 1983 in regard to the above-entitled cause:

"ORDERED: Petition for Review - DENIED.
FURTHER ORDERED: Motion for Oral Argument - DENIED.
FURTHER ORDERED: The Stay heretofore entered is vacated.

Justice Stanley G. Feldman voting to grant both petition and motion."

Record on Petition for Post Conviction Relief returned to Maricopa County Superior Court this 19th day of October, 1983, to wit: Instruments (3 Parts); Minute Entries.

S. ALAN COOK, Clerk

By Kathleen E. Kemplay
Deputy Clerk

TO:
James E. Scarboro, Esq., Mark S. Wallace, Esq., and Parker C. Folse III, Esq., Martori, Meyer, Hendricks & Victor, 2700 North Third Street, Suite 4000, Phoenix, Arizona 85004
Hon. Robert K. Corbin, Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007 Attn: Crane McClennen
Thomas E. Collins, Maricopa County Attorney, 101 West Jefferson Street, Phoenix, Arizona 85003
Hon. Marilyn A. Riddell, Judge, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003
Vivian Kringle, Clerk, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003 (Certified Copy)
John Henry Knapp, Box B 33659, Arizona State Prison, Florence, Arizona 85232

APPENDIX II

83-5942

FILED
DEC 16 1983
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, John Henry Knapp, pursuant to Rule 46.1, Supreme Court Rules, asks leave to file the accompanying Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. The Petitioner was represented below without cost by Martori, Meyer, Hendricks & Victor. Petitioner has been incarcerated at The Arizona State Prison, Florence, Arizona, since January 1975. Petitionsr has attached hereto as Exhibit "A" his declaration in support of this request on a form supplied by The United State District Court, District of Arizona.

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MARTORI, MEYER, HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION
2700 NORTH THIRD STREET
SUITE 4000
PHOENIX, ARIZONA 85004

Respectfully submitted: December 16, 1983.

MARTORI, MEYER, HENDRICKS & VICTOR

By (James E. Scarboro)

James E. Scarboro
Mark S. Wallace
Colin F. Campbell
2700 N. Third Street
Suite 4000
Phoenix, Arizona 85004

Attorneys for Petitioner

MARTORI, MEYER, HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION
2700 NORTH THIRD STREET
SUITE 4000
PHOENIX, ARIZONA 85004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

_____

vs.

_____

_____

_____

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, John Henry Kuhpp, declare that in support of my pleadings to proceed in the above entitled case without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to relief.

1. Are you presently employed? Yes ( ) No (X)
   a. If the answer is "yes," state the amount of salary or wages per month, and give the name and address of your employer:

   _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received:

   Evans Manufacturing Co., Houston, Texas, September-October 1974.
   $ 3.10/hour

2. Have you received within the past twelve months any money from any of the following sources:

	Yes	No
a. Business, profession, or form of self-employment?		X
b. Rent payments, interest, or dividends?		X
c. Pensions, annuities, or life insurance payments?		X
d. Gifts or inheritances?	X	
e. Any other sources?		X

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months:

   January 1983. Received gift of $35 from mother

   _____

   _____

   _____

3. Do you own cash or do you have money in a checking or savings account?
   Yes (X) No ( ) (Include any funds in prison accounts.)

(4/5/83)

If the answer is "yes," state the total value of the items owned:

$0.24

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ( ) No (✓)

If the answer is "yes," describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support:

None

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 11/4/83 (Date)

John H. Knapp
Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of $ .24 on account to his credit at the ASPC institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said None institution:

Date:

Authorized Officer of Institution